BRISTOL BAY NATIVE CORP.

IBLA 77-415 Decided June 4, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting oil and gas lease offers, AA-10900 et al.

Affirmed.

1. Oil and Gas Leases: Generally -- Oil and Gas Leases: Applications -- Oil and Gas Leases: Lands Subject to -- Withdrawals and Reservations: Generally -- Withdrawals and Reservations: Effect of

   Oil and gas offers, filed for lands withdrawn by PLO No. 5418, must be rejected. The order was issued under the authority of the Pickett Act, 43 U.S.C. §§ 141-142 (1970), repealed by FLPMA, and the order was not arbitrary, capricious, or an abuse of discretion.

2. Administrative Procedure: Administrative Procedure Act -- Alaska: Alaska Native Claims Settlement Act -- Alaska: Mineral Leases and Permits -- Withdrawals and Reservations: Generally -- Withdrawals and Reservations: Authority to Make

   Whether the issuance of PLO No. 5448, prohibiting oil and gas leasing in Alaska, without prior proposed rulemaking is violative of the Administrative Procedure Act or of the Alaska Native Claims Settlement Act need not be decided; by such issuance the Secretary has enunciated a policy of rejecting mineral lease applications well within his discretionary authority.

APPEARANCES: Elizabeth Johnston, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Bristol Bay Native Corporation (Bristol Bay) has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated April 25, 1977, rejecting its oil and gas offers AA-10900 et al. 1/

> The decision appealed from recited in applicable portion as follows:
>
> At the time the offers were filed, the lands covered by the applications were withdrawn from mineral leasing under authority of Section 17(d)(1) of the Alaska Native Claims Settlement Act of December 18, 1971 (Public Law 92-203; 85 Stat. 688), by Public Land Order 5418, dated March 25, 1974, for classification or reclassification by the Secretary of the Interior. The provisions of this withdrawal are still in effect and have not been amended to permit mineral leasing nor have the lands been classified under appropriate law.
>
> Public Land Order 5418 states that applications for leases under the Mineral Leasing Act will be rejected until the order is modified or the lands are appropriately classified to permit mineral leasing. This is consistent with the requirements of the Departmental regulations in 43 CFR 2091.1 * * *.

Appellant's statement of reasons asserts that (1) the Secretary abused his discretion in Public Land Order No. 5418 (PLO) (39 FR 11547 (March 25, 1974)), by withdrawing "all unreserved Public lands in Alaska," and (2) promulgation of the order without opportunity for comment violates the Alaska Native Claims Settlement Act of December 18, 1971 (ANCSA), 43 U.S.C. §§ 1601-1628 (1976), and the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. (1976).

More specifically, appellant urges that the Secretary, in issuing the public land order, used the Pickett Act, 43 U.S.C. §§ 141-142 (1970), subsequently repealed by the Federal Land Policy and Management Act, section 704(a), 90 Stat. 2792-3, to impose a land freeze on all of Alaska, a concept which appellant asserts, that section 17(d)(1) of ANCSA, 43 U.S.C. § 1616(d)(1) (1976), rejects. Appellant also asserts that the failure "to give the public opportunity for meaningful participation in the rulemaking process prior to issuance of a final rule" renders the public land order nugatory. Bristol Bay also contends that 5 U.S.C. § 553(a)(2) (1976), exempting "public property" from the ambit of 5 U.S.C. § 553 (1976) (the rulemaking requirements),

1/ The offers are listed in Appendix A, attached hereto.

does not impair its argument since (a) section 25 of ANCSA, 43 U.S.C. § 1624 (1976), authorizes the Secretary "to issue and publish in the Federal Register, pursuant to the Administrative Procedure Act, such regulations as may be necessary to carry out the purposes of this chapter" and (b) section 26 of ANCSA, 85 Stat. 688, 715, makes the provisions of ANCSA controlling to "the extent there is a conflict between . . . [ANCSA] and any other Federal laws applicable to Alaska . . ."

[1] PLO No. 5418 reads in pertinent part as follows;

> By virtue of the authority vested in the President by the Act of June 25, 1910, as amended, 43 U.S.C. 141 (1970), and pursuant to Executive Order No. 10355 of May 26, 1952 (17 FR 4831), and by virtue of the authority vested in the Secretary of the Interior by section 17(d)(1) of the Alaska Native Claims Settlement Act of December 13, 1971, 43 U.S.C. 1616(d)(1), 1970 Supplement II (hereinafter referred to as the Act), it is ordered as follows:
>
> 1. Subject to valid existing rights, Public Land Order No. 5180, of March 9, 1972, as amended, 37 FR 5583-5584, withdrawing lands for classification and for protection of the public interest in lands, is hereby further amended to add the following described lands:
>
> All unreserved public lands in Alaska, or those which may become unreserved unless specified by order at that time.
>
> The lands described above aggregate approximately 15,300,000 acres.
>
> 2. While the lands described in paragraph 1 of this order remain withdrawn, the lands shall be subject to administration by the Secretary of the Interior under applicable laws and regulations and his authority to make contracts, to grant leases, permits, rights-of-way, or easements shall not be impaired by this withdrawal. Applications for leases under the Mineral Leasing Act will be rejected until this order is modified or the lands are appropriately classified to permit mineral leasing.

Contrary to appellant's contentions, the language and history of section 17(d)(1) 2/ do not compel the conclusion that the Secretary's

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2/ Section 17(d) of ANCSA reads in part as follows:

"(d)(1) Public Land Order Numbered 4582, 34 Federal Register 1025,

issuance of PLO No. 5418 was arbitrary, capricious, or an abuse of discretion. ANCSA contains no language specifically limiting the executive authority for withdrawals under the Pickett Act and a limitation on the executive power of withdrawal is not lightly to be inferred. See United States v. Midwest Oil Company, 236 U.S. 459 (1915). Another indicium of that philosophy is the position taken by the executive department that the Pickett Act did not restrict the inherent authority of the President to withdraw lands with respect to permanent withdrawals for Federal uses. See, e.g., 40 Op. Atty. Gen. 73 (1941); 37 Op. Atty. Gen. 433 (1934); Lyman B. Crunk, 68 I.D. 190, 192-4 (1961); Denver B. Williams, 67 I.D. 315, 316 (1960); P & G Mining Co., 67 I.D. 217 (1960); Solicitor's Opinion, M-36024, 60 I.D. 402, 405 (1950). Cf. Portland General Elec. Co. v. Kleppe, 441 F. Supp. 859 (D. Wyo. 1977).

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fn. 2 (continued)
as amended, is hereby revoked. For a period of ninety days after December 19, 1971, all unreserved public lands in Alaska are hereby withdrawn from all forms of appropriation under the public land laws, including the mining (except locations for metalliferous minerals) and the mineral leasing laws. During this period of time the Secretary shall review the public lands in Alaska and determine whether any portion of these lands should be withdrawn under authority provided for in existing law to insure that the public interest in these lands is properly protected. Any further withdrawal shall require an affirmative act by the Secretary under his existing authority, and the Secretary is authorized to classify or reclassify any lands so withdrawn and to open such lands to appropriation under the public land laws in accord with his classifications. Withdrawals pursuant to this paragraph shall not affect the authority of the Village Corporations, the Regional Corporations, and the State to make selections and obtain patents within the areas withdrawn pursuant to section 1610 of this title.

"(2)(A) The Secretary, acting under authority provided for in existing law, is directed to withdraw from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, and from selection by Regional corporations pursuant to section 1610 of this title, up to, but not to exceed, eighty million acres of unreserved public lands in the State of Alaska, including previously classified lands, which the Secretary deems are suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems: Provided, That such withdrawals shall not affect the authority of the State and the Regional and Village Corporations to make selections and obtain patents within the areas withdrawn pursuant to section 1610 of this title.

"(B) Lands withdrawn pursuant to paragraph (A) hereof must be withdrawn within nine months of December 18, 1971. All unreserved public lands not withdrawn under paragraph (A) or subsection (d)(1) of this section shall be available for selection by the State and for appropriation under the public land laws."

Appellant contends that by virtue of section 17(d)(2)(B) of ANCSA, supra, the lands in issue are open to oil and gas leasing. In essence, it asserts that the language "shall be available * * * for appropriation under the public land laws" relates to mineral leasing.

The Public Land Law Review Commission's "Legal Study of the Federal Competitive and Noncompetitive Oil and Gas Leasing Systems," published April 1969, by the Rocky Mountain Mineral Law Foundation, discusses the term "disposition" which is similar to "appropriation," as follows at page 69:

> The fact that a withdrawal is made does not automatically bar oil and gas leasing on the withdrawn lands. The language of the Act, if the withdrawal is by Congress, or of the Land Order, if by the President or other delegated agency, must be considered. The lands are not specifically withdrawn from oil and gas leasing unless, in the language of the act or order, the prohibition against leasing is specific. For example, in Udall v. Tallman [3/] * * * the United States Supreme Court declared that a withdrawal order barring lands from "settlement, location, sale or entry, or other disposition . . . under any of the public land laws" did not specifically withdraw the land from leasing under the Mineral Leasing Act of 1920. The Court reasoned that "public land laws" are distinguishable from the "mineral leasing laws", and that "or other disposition" applies only to circumstances wherein the applicant could obtain title from the United States noting that "An oil and gas lease does not vest title to the lands in the lessee". Accordingly, lands so withdrawn were open for leasing under the Mineral Leasing Act.

Where Congress has intended to delimit the Secretary's withdrawal authority, it has done so in clear, unmistakable terms. See, e.g., 43 U.S.C. § 1714(a) (1976). 4/

Moreover, the language of the public land order specifically interdicts oil and gas leasing until the Secretary takes affirmative action to permit such leasing.

3/ 380 U.S. 1, 9 (1965).

4/ This subsection provides as follows:

"(a) On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate." (Emphasis supplied.)

[2] We proceed next to consider appellant's contention that PLO No. 5418 was improperly promulgated because it was not preceded by proposed rulemaking. We need not decide this issue, since the issuance of the withdrawal manifests a Secretarial policy to reject mineral lease applications until certain actions are taken. The withdrawal order is superfluous to the exercise of his discretion. Udall v. Tallman, supra; Arnold v. Morton, 529 F.2d 1101 (9th Cir. 1976); Burglin v. Morton, 527 F.2d 486 (9th Cir. 1976), cert. denied, 425 U.S. 973 (1976); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1965); Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257 (D.C. Cir. 1963), cert. denied, 373 U.S. 951; Rowe v. United States, 464 F.Supp. 1060 (D. Alas. 1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

APPENDIX "A"

T. 17 S., R. 54 W., Seward Meridian

AA-10900
AA-10901
AA-10902
AA-10903
AA-10904
AA-10905
AA-10906
AA-10907
AA-10908

T. 18S., R. 54 W., Seward Meridian

AA-10909
AA-10910
AA-10911
AA-10912 (Partially within)
AA-10913 (Partially within)

T. 18 S., R. 53 W., Seward Meridian

AA-10912 (Partially within)
AA-10913 (Partially within)
AA-10914

T. 41 S., R. 59 W., Seward Meridian

AA-10917
AA-10918
AA-10919
AA-10920
AA-10921 (Partially within)

T. 41 S., R. 58 W., Seward Meridian

AA-10921 (Partially within)
AA-10922
AA-10923
AA-10924
AA-10925

T. 41 S., R. 57 N., Seward Meridian

AA-10926

T. 48 S., R. 61 W., Seward Meridian

AA-10927